

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SERVANDO JASSO,

Appellant,

v.

DEPARTMENT OF HEALTH,

Respondent.

No. 39050-7-II

UNPUBLISHED OPINION

Armstrong, J. — Servando Jasso appeals the revocation of his registered counselor credential by the Department of Health (Department). At an administrative hearing, a health law judge found that Jasso had sexually abused his daughter, constituting unprofessional conduct under the Uniform Disciplinary Act, RCW 18.130.180(1) (Act). Jasso argues (1) substantial evidence does not support the health law judge’s factual findings; (2) the health law judge erred by not dismissing the charges based on pre-Act conduct until the third day of the hearings, thereby prejudicing Jasso; (3) evidence of misconduct occurring before the Act’s effective date was not admissible to prove the charged conduct; and (4) the health law judge erred in allowing the testimony of the Department’s expert witness. Finding no reversible error, we affirm.

FACTS

Servando Jasso’s oldest daughter, AJ, was born in 1966, during his first marriage. Jasso divorced his first wife when AJ was 13; after the divorce, AJ refused any contact with her father. According to AJ, Jasso sexually, physically, and verbally abused her throughout her childhood. Jasso’s second daughter, RJ, was born in 1983, during his second marriage. After the dissolution of his second marriage in 1987, the court awarded custody of RJ to her mother, granting Jasso

limited, supervised visitation because the court was concerned that he might have sexually abused RJ.

Jasso received his license to practice as a mental health counselor in 1990. In 2004, after learning of Jasso's profession, RJ wrote the Department claiming that her father sexually abused her as a child. RJ explained that she had only recently "recovered" many of the memories, including the worst instances of sexual abuse that occurred when she was very young. Administrative Record (AR) at 887-89. The Department investigated the complaint and filed a statement of charges against Jasso in October 2006. The statement alleged that Jasso emotionally, physically, and sexually abused both of his daughters and that these acts constituted unprofessional conduct under the Act.

Before the administrative hearing, Jasso moved to exclude two of the Department's exhibits. The first exhibit was AJ's deposition transcript from Jasso's second divorce proceeding. In the deposition, AJ described specific occasions where Jasso sexually, emotionally, and physically abused her. The second exhibit was the findings of fact and conclusions of law from the same divorce proceeding. There, the judge concluded that (1) Jasso was responsible for the long-term abuse of AJ and (2) overwhelming evidence pointed to the sexual abuse of RJ. The presiding officer¹ denied the motion and admitted the exhibits to show a "common scheme or plan" relating to sexual abuse under ER 404(b). AR at 440. He also noted that since the reliability of RJ's memories was at issue, evidence of AJ's deposition was admissible to corroborate RJ's testimony of sexual abuse.

¹ The prehearing order was signed by Jerry Mitchell, Health Law Judge. At the hearing itself, the presiding officer was Zimmie Caner, Health Law Judge.

At the outset of the hearing, Jasso moved to dismiss the charges based on conduct that occurred before the effective date of the Act, June 11, 1986. On the third day of the hearing, the health law judge granted the motion, dismissing all allegations that predated the Act for lack of jurisdiction.² The remaining allegations included only the abuse of RJ from 1986 through 1994. The health law judge allowed evidence of abuse prior to 1986 for the limited purpose of showing a “common scheme or plan.” AR at 598-99.

During the hearing, RJ testified that Jasso sexually abused her from age two-and-a-half until she was ten years old. RJ described several incidents when Jasso sexually abused her during supervised visits when she was left alone with her father. Evelyn Galbreath, RJ’s maternal grandmother and visitation supervisor, testified that she never left RJ alone with Jasso during the supervised visits. Jasso testified that he never touched RJ in a sexual manner. The Department’s expert witness, Dr. Kathleen O’Shaunessy, a clinical psychologist, opined that Jasso sexually abused RJ. Jasso’s expert, Dr. August Piper, testified that it was likely that RJ’s memories were false, reconstructed memories, influenced by subsequent experiences.

The health law judge found, *inter alia*, that Jasso sexually abused RJ during supervised visits from approximately 1987 through 1993. Based on this and other findings, the health law judge concluded that Jasso committed unprofessional conduct under the Act and that he posed a great risk to public safety. Accordingly, the health law judge ruled that Jasso’s registered

² Although the motion to dismiss was untimely, the health law judge entertained the motion on the basis that Jasso raised a jurisdictional issue.

counselor credential should be revoked.³

Jasso sought judicial review of the order before the Thurston County Superior Court, which affirmed the health law judge's ruling.

ANALYSIS

I. Standard of Review

Under the Administrative Procedures Act (APA), we can reverse an agency's adjudicative decision if, among other reasons, the agency erroneously interpreted or applied the law, or substantial evidence does not support the order. RCW 34.05.570(3)(d), (e); *Timberline Mobile Home Park v. Wash. State Human Rights Comm'n*, 122 Wn. App. 896, 900, 95 P.3d 1288 (2004). We apply the APA's standards directly to the agency record, sitting in the same position as the superior court. *Timberline*, 122 Wn. App. at 900. A party challenging the agency's actions bears the burden of proving the agency's decision is erroneous. RCW 34.05.570(1)(a). We review an agency's legal conclusions de novo to determine whether the health law judge correctly applied the law. *Timberline*, 122 Wn. App. at 900. We review the agency's factual findings for substantial supporting evidence in the record. RCW 34.05.570(3)(e); *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wn. App. 291, 296, 49 P.3d 135 (2002).

³ Under the Act, the commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not, constitutes unprofessional conduct. RCW 18.130.180(1). Upon a finding that a license holder has committed unprofessional conduct, the disciplinary authority shall issue appropriate sanctions such as revocation of the license. RCW 18.130.160(1).

II. Jurisdiction Under the Act

Jasso argues the statement of charges was unlawful because it contained allegations of abuse that occurred before the effective date of the Act. Jasso reasons that the health law judge's late dismissal of these unlawful charges (on the third day of the hearing) prejudiced him.

Under the APA, we will grant relief only if the person seeking relief can show prejudice. RCW 34.05.570(1)(d). The Department conceded that it could not impose sanctions for conduct occurring before the Act's effective date. The health law judge then dismissed all allegations that predated the Act for lack of jurisdiction. Despite the dismissal of those claims, Jasso makes generalized allegations of prejudice. He fails, however, to make a specific showing of actual prejudice. Mere allegations of prejudice are insufficient to show prejudice. *See Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 437-38, 922 P.2d 126 (1996) (a finding of prejudice is generally a factual determination that is presumed only in extreme cases). This is particularly so where, as we discuss below, the alleged error centers on evidence that was admissible for the limited purpose of showing a common scheme or plan. The health law judge did not err or prejudice Jasso in dismissing the pre-Act charges on the third day of the hearing.

III. Substantial Evidence

Jasso next argues that the Department failed to prove by clear, cogent, and convincing evidence that he abused RJ. Jasso specifically challenges the health law judge's finding of facts 1.4 through 1.14, and 1.17. The essence of his challenge is that these findings were based on improperly admitted evidence, allegations of abuse proved only by a preponderance of the evidence, and unreliable testimony based largely on "recovered" memories. Br. of Appellant at 27-

28.

Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the matter asserted. *Superior Asphalt*, 112 Wn. App. at 296. The substantial evidence standard is highly deferential to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). For example, we view the evidence in the light most favorable to the party who prevails in the highest administrative forum. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). We also accept the fact finder's views as to the credibility of witnesses and weight to be given to reasonable but competing inferences. *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). We need not be persuaded of the truth or correctness of an agency's findings, only that *any* fair-minded person could have ruled as the agency did in light of the evidence. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

Here, the health law judge found neither the grandmother nor Jasso to be credible witnesses. In contrast, the health law judge found RJ credible in light of her demeanor, consistent prior statements, ability to perceive and remember, plausible description of events consistent with independent ascertainable facts, and Dr. O'Shaunessy's expert testimony. The health law judge also relied on a report that the grandparents were not taking their supervision responsibilities seriously, expert testimony that RJ had the capacity to store and retrieve memories from an early age, and AJ's deposition, which it used to find a common scheme or plan of sexual abuse and to assess RJ's credibility.

RJ testified to ongoing sexual abuse by her father and that her clearest memories of abuse

occurred after the supervised visitations began. RJ also claimed that her grandparents left her alone with her father on many occasions during these visits. AJ's deposition testimony described similar incidents where Jasso sexually abused her. Although Jasso denied the abuse and presented other evidence in support of his denial, the health law judge accepted the Department's evidence and rejected Jasso's. This decision, involving credibility and what reasonable inferences flow from the evidence, lies well within the health law judge's discretion.

IV. ER 404(b) Evidence

Jasso argues the health law judge erred in admitting AJ's deposition and the findings of fact and conclusions of law from his second divorce proceedings under ER 404(b). He reasons that the alleged abuse of AJ is substantially different from the alleged abuse of RJ and is, thus, insufficient to show a "common scheme or plan." Br. of Appellant at 19. Jasso also claims the health law judge used evidence of AJ's alleged abuse to assess RJ's credibility, a purpose ER 404(b) does not authorize. In addition, Jasso asserts that the factual findings from his second divorce proceeding were based on a mere preponderance of the evidence and therefore do not comply with the higher standard of proof at the administrative hearing—clear, cogent, and convincing evidence.

Under the APA, evidence is admissible if it is the kind of evidence that reasonably prudent persons are accustomed to rely on in the conduct of their affairs. RCW 34.05.452(1). A presiding officer may exclude evidence on constitutional or statutory grounds, a claimed privilege, or if the evidence is irrelevant, immaterial, or unduly repetitious. RCW 34.05.452(1). A presiding officer can use the Washington Rules of Evidence as guidelines but they are not binding.

RCW 34.05.452(2). Because no specific rules govern the admissibility of this type of evidence in administrative proceedings, we turn, as a reference point, to the rules governing the admissibility of prior misconduct in a criminal context. *Fettig v. Dep't of Soc. & Health Servs.*, 49 Wn. App. 466, 473, 744 P.2d 349 (1987).

ER 404(b) provides that evidence of a defendant's prior misconduct is inadmissible to demonstrate the accused's propensity to commit the crime charged. A trial court may, however, admit evidence of prior misconduct for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). One such purpose, a "common scheme or plan," renders evidence of prior misconduct admissible to show either (1) several crimes that constitute constituent parts of a larger plan or (2) a plan devised and used to repeatedly perpetrate separate but very similar crimes. *State v. Yates*, 161 Wn.2d 714, 750, 168 P.3d 359 (2007) (relying on *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995)). Prior misconduct falling under one of the recognized exceptions must be (1) proved by a preponderance of the evidence; (2) admitted for the purpose of showing a common scheme or plan; (3) relevant to prove an element of the crime charged; and (4) more probative than prejudicial. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Here, Jasso claims the evidence falls short of the clear, cogent, and convincing evidence standard. But even in a criminal trial, where the pertinent standard is "beyond a reasonable doubt," prior misconduct need only be proved by a preponderance of the evidence. *Lough*, 125 Wn.2d at 853. Accordingly, we address whether the evidence was admitted for the proper purpose, whether it was relevant to prove the charges, and whether it was more probative than

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prejudicial.

A. Admitted to Prove a “Common Scheme or Plan”

Jasso claims the health law judge used the impugned evidence solely to assess RJ’s credibility, a purpose ER 404(b) does not authorize.

Evidence of misconduct must be offered for a legitimate purpose to be admissible. *Lough*, 125 Wn.2d at 853. Here, both pieces of evidence were purportedly admitted to show a common scheme or plan relating to sexual abuse. The health law judge, however, stated in the final order that “evidence regarding [Jasso’s] sexual abuse of AJ was admitted under ER 404(b) *to help the presiding officer assess the credibility of RJ.*” AR at 596 (Final Order at 10 n.22) (emphasis added). While Jasso is correct that this stated purpose is untenable, the health law judge’s wording in the final order imprecisely describes her actual position. In her oral ruling, the health law judge stated that “under evidentiary rule 404(b), the alleged sexual abuse of Mr. Jasso’s first daughter, [AJ], is admitted *and* will be considered in weighing the credibility of the second daughter, [RJ].” AR at 1531 (emphasis added). The health law judge explicitly adopted Judge Mitchell’s rationale for the ruling, that the evidence was admissible to show a “common scheme or plan” and that it could also be used as corroborating evidence because RJ’s credibility was at issue. AR at 440.

Moreover, Jasso has not shown that the hearing officer used the evidence only to assess RJ’s credibility. To the contrary, the health law judge found “a pattern of abusing vulnerable females of different ages under [Jasso’s] control and/or guidance” and that “[Jasso’s] behavior demonstrates a pattern of abuse, denial, deceit, and a lack of remorse or empathy for his victims.” AR at 597. Based on these findings, the health law judge concluded Jasso could not be trusted

with vulnerable counseling populations. Notwithstanding the wording in the final order, the record is clear that the hearing officer used evidence of AJ's sexual abuse to find a plan relating to the sexual abuse of vulnerable girls and women under Jasso's control. Any effect on RJ's credibility was a subsequent result of admitting the evidence.

B. Relevant to a Material Issue

Where a defendant is charged with child rape or child molestation, the existence of "a design to fulfill sexual compulsions evidenced by a pattern of past behavior" is probative of the defendant's guilt. *DeVincentis*, 150 Wn.2d at 17-18. Under the Act, a pattern of past behavior is particularly pertinent in determining whether a respondent is a threat to public safety. *See* RCW 18.130.160.

Generally, evidence of a plan requires the existence of striking factual similarities between the prior bad act and the current crime. *See e.g., Lough*, 125 Wn.2d at 861 (defendant had a history of drugging women with whom he had a personal relationship in order to rape them while unconscious or confused); *DeVincentis*, 150 Wn.2d at 22 (defendant devised a scheme to lure young girls into an apparently safe but actually isolated environment, desensitizing them to nudity by wearing almost no clothes around them). Similarity in the acts, however, does not mean that the acts must be unique or uncommon. *DeVincentis*, 150 Wn.2d at 21. The similarity must be clearly more than coincidental; it must show conduct created by design. *Lough*, 125 Wn.2d at 860.

Here, evidence of a common scheme or plan is relevant to show that the abuse actually occurred and that Jasso represents a threat to public safety. The pertinent issue is whether AJ's

allegations are sufficiently similar to demonstrate a common scheme or plan. Jasso claims AJ's allegations of abuse "primarily focus on physical and emotional abuse during her teenage years, whereas RJ's allegations were sexual in nature and occurred during her infancy." Br. of Appellant at 21. According to Jasso, the Department's contention—that the "plan" involved sexual abuse of female children while they were in his care and while he held a position of authority over them—does not rise to the level of "substantial similarity" necessary to demonstrate a common scheme or plan. Reply Br. of Appellant at 7.

In fact, RJ testified to sexual abuse from the ages of two-and-a-half until ten years old, not just as an infant. RJ testified that during supervised visitations, her father fondled and groped her breasts and touched her between her legs and her genitals while dressing her. AJ also testified she was sexually abused, recalling specific instances from around the time that she was 11. She claimed that Jasso used to enter her room at night, unzip his pants, and force himself upon her, touching her breasts and between her legs. A common design to fulfill Jasso's sexual compulsion by abusing young female girls under his control is tenable. Both RJ and AJ described sexual abuse by Jasso until they were 10 or 11 years old, or around when contact with him ceased. And the sexual conduct was generally similar, touching the girls between their legs and on their breasts. Under our deferential standard of review, which grants the health law judge broad discretion not limited by a strict application of the Rules of Evidence, the health law judge did not err in finding the earlier abuse of AJ relevant to show a common scheme or plan.

C. Probative v. Prejudicial

Finally, before admitting evidence of prior misconduct under ER 404(b), a court must find

its probative value outweighs its prejudicial effect. *DeVincentis*, 150 Wn.2d at 23. Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the child victim's testimony. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

Given the lack of other direct evidence of sexual abuse, and that the challenge was to the reliability of RJ's memories, the probative value of AJ's testimony is high. More importantly, an administrative law judge considered the evidence, not a jury. The chance of undue prejudice is therefore diminished. The health law judge did not err in finding the evidence more probative than prejudicial. In sum, under the more flexible standards of the APA, we conclude that the health law judge did not abuse her discretion in admitting the evidence of prior sexual abuse.

V. Corroborating Evidence

Jasso argues the health law judge misapplied case law by citing *State v. Young*, 160 Wn.2d 799, 161 P.3d 967 (2007), in support of the position that child abuse may be proven with corroborating evidence. Jasso claims *Young* does not apply because it is a criminal case and because it is factually distinguishable. He further claims that corroborating evidence may only be used to bolster a child witness's reliability.

In the final order, the health law judge noted that child abuse may be proven with corroborating evidence under *Young*. The health law judge considered nine factors from *Young* in assessing the credibility of Jasso's and AJ's testimony. The health law judge explained that "[i]n *State v. Young*, the court evaluated corroborating circumstances to assess the trustworthiness of a child's hearsay statement that was admitted when the child was not available. In the case at hand,

the child, now a young adult, testified.” AR at 599 (Final Order at 13 n.28).

The applicability of *Young* to this case is tenuous at best. The factors described in *Young* focus on the declarant’s motives and demeanor and on the context in which the declarant made the hearsay statement. *Young*, 160 Wn.2d at 811. These facts are not necessarily relevant in assessing the credibility of live testimony or assessing the reliability of the corroborating evidence itself. *Young*, 160 Wn.2d at 811. Moreover, the Department offered no evidence of RJ’s hearsay statements as a child. But Jasso does not demonstrate how the health law judge’s *Young* analysis prejudiced him. Although the health law judge’s discussion of *Young* is perhaps misplaced, the record is clear that the judge found RJ credible based on her demeanor and consistency, as well as AJ’s supporting testimony.

VI. Expert Testimony

Finally, Jasso claims the health law judge erred in allowing the expert testimony of Dr. O’Shaunessy. According to Jasso, Dr. O’Shaunessy’s testimony was incompetent and lacked foundation. Jasso argues Dr. O’Shaunessy formed her opinion that Jasso abused RJ without firsthand knowledge, based on unreliable, irrelevant, and contested reports and evidence. The Department counters that (1) Jasso failed to object to the foundation of Dr. O’Shaunessy’s testimony at the hearing, waiving the issue on appeal, and (2) insufficient briefing on the issue, namely failure to cite to relevant authority, also precludes review on appeal.

We generally will not review an issue raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001). Although Jasso did not challenge Dr. O’Shaunessy’s qualifications to

testify as an expert witness, he claims to have objected several times during her testimony, sufficient to preserve this issue for appeal. A close reading of the record does not support Jasso's position. Of Jasso's several objections made during Dr. O'Shaunessy's testimony, none relates to her ability to opine on whether Jasso abused RJ or the reliability of RJ's memory.⁴ Jasso did object at numerous points throughout her testimony to leading questions, the foundation of a question, relevance, and the admissibility of the evidence. But Jasso did not challenge Dr. O'Shaunessy's competence to testify as an expert witness as he does now. Accordingly, Jasso failed to preserve the issue for review on appeal.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.

⁴ Dr. O'Shaunessy testified it was her opinion that Jasso sexually abused RJ. At some point during her lengthy answer, Jasso's only objection was that "[t]here's not a question before the witness." AR at 1224.